

*United States Court of Appeals
for the Second Circuit*



**INTERVENOR'S
BRIEF**

76-4147

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Civil Action Docket

No. 76-4147

AAACON AUTO TRANSPORT, INC.
Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA
Respondents.

and

AUTO DRIVEAWAY COMPANY
Intervenor.

B
pls

BRIEF OF INTERVENOR IN SUPPORT

OF RESPONDENT

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| AAACon Auto Transport, Inc. |) | |
| |) | |
| Petitioner |) | |
| |) | |
| v. |) | Civil Action Docket |
| |) | |
| INTERSTATE COMMERCE COMMISSION |) | No. 76-4147 |
| and UNITED STATES OF AMERICA |) | |
| |) | BRIEF OF INTERVENOR IN |
| Respondents |) | <u>SUPPORT OF RESPONDENT</u> |

STATEMENTS OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Commission act arbitrarily and capriciously in the application of its discretion in finding that petitioner had been engaged in unjust and unreasonable practices in connection with matters relating to the transportation of automobiles in driveaway service in interstate or foreign commerce in violation of Section 20(11), 219, and 216(b) of the Interstate Commerce Act, and has performed operations not authorized by its certificate in violation of Section 206(a) of the Act in the terms and conditions of the limitations of the said certificate and did the Commission base its decision on the entire record and substantial evidence.

2. Whether the Commission acted arbitrarily and capriciously in finding that the restriction in the certificate of public convenience and necessity held by petitioner for the transportation of traffic to automobile dealers is clear, unambiguous and serves a useful purpose, and whether the Commission departed from a previous norm in its interpretation.

3. Whether the Commission acted arbitrarily or capriciously in finding that respondent in application No. FF-359 Auto Trip, USA., had failed to establish that it was a qualified applicant and that the proposed operations would be consistent with the public interest.

This case has not previously been before this Court.

REFERENCES TO PARTIES AND RULINGS

The order appealed from was served by the Interstate Commerce Commission on April 19, 1976, and published as AAACon Auto Transport, Inc., -Investigation and Revocation of Certificate, 124 M.C.C. 493.

Intervenor, Auto Driveaway Company, was a party to the proceedings before the Commission and was permitted leave to intervene by this court by its order of July 19, 1976.

STATEMENT OF THE CASE

This appeal arises from the order of the Interstate Commerce Commission (I.C.C.) which dealt with three proceedings before the Commission. In No. MC-C-7287 an action brought under Section 212(a) of the Interstate Commerce Act, instituted by the Commission itself, was an investigation pursuant to Sections 204(c) and 212(a) of the Interstate Commerce Act investigating the practices of respondent in its relationship with the shipping public as well as to determine whether respondent had operated beyond the terms and conditions of its certificate of public convenience and necessity.

Also embraced in the reported decision is the Commission's report and decision in No. MC-C-7287, Sub. No. 1, under the provisions of Section 554(e) of the Administrative Procedure Act wherein petitioner sought a clarification of the restriction in its certificate of public convenience and necessity against it conducting operations as a common carrier, by motor vehicle, on behalf of automobile dealers.

The third matter embraced in the Commission's reported decision was an application under Section 410

of the Interstate Commerce Act docketed as No. FF-359 wherein Auto Trip USA, Inc., of New York, N.Y. sought a permit under Section 410 of the Interstate Commerce Act to operate as a freight forwarder in interstate commerce. It is not disputed that Auto Trip USA, Inc., is an affiliate of AAACon Auto Transport, Inc., and been permitted to intervene on behalf of petitioner by order of the court of July 19, 1976.

The order to which this appeal is directed affirms the findings of fact and conclusions of law set forth in the initial decision of the Administrative Law Judge served November 30, 1973 (R.A. pp.1548,1564,1590 and 1595).

The issues presented by petitioner contend that the Commission in reaching its decision to which this appeal is directed has departed from a prior norm; that the order under review is not supported by substantial evidence and that the decision is not based upon the entire record. The statement of issues presented by petitioner are not different than those said to be the issues by intervenor, Auto Driveaway Company. It is submitted, however, that the Commission acted neither arbitrarily

nor capriciously in reaching its ultimate conclusion and that those conclusions are founded upon substantial evidence, nor did the Commission depart from a prior norm.

PRELIMINATY STATEMENT

Intervenor, Auto Driveaway Company, is a common carrier by motor vehicle authorized to operate in interstate and foreign commerce pursuant to certificates of public convenience and necessity issued to it by the Interstate Commerce Commission in Docket No. MC-125985 and sub-numbered certificates. It was a party to all three proceedings when they were before the Commission either as protestor or as an intervenor on behalf of the Bureau of Enforcement. Its interest in matters before the Commission lay with protecting what operations it performs which were specifically excluded from the certificate held by petitioner. Auto Driveaway Company has no restriction against the transporting of used automobiles to and from dealers as does petitioner. Its second area of concern was in the freight forwarder application which was subsequently consolidated with the revocation proceeding wherein petitioner sought to operate as a freight forwarder transporting automobiles

in such a fashion that the restriction against traffic being transported to and from dealers could be easily circumvented. Further, it has an interest in this proceeding in that Auto Driveaway Company, as is petitioner, are part of a substantial industry that has evolved in the last twenty-five years which makes its interstate transportation services available to the general public at a price which it can afford. Intervenor is also concerned with its public image and the low level of esteem which the shipping public holds operations of this sort when not properly conducted or when conducted in such a manner as to create adverse public reaction. Finally, intervenor's interest is such that it resists petitioner's efforts to have the Commission declare that the term "automobile dealers" is anything other than descriptive of persons engaged in the business of dealing in automobiles. It has a valid and justiciable interest in these matters now before this court.

ARGUMENT

A. FINDING BY I.C.C. THAT PETITIONER ENGAGED IN UNJUST AND UNREASONABLE PRACTICES IN VIOLATIONS OF THE ACT WAS NOT ARBITRARY OR CAPRICIOUS, WAS BASED UPON SUBSTANTIAL EVIDENCE AND BASED ON THE ENTIRE RECORD

The facts of record in the matter before the Commission are replete with instances wherein petitioner, AAACon has knowingly and willfully transported used automobiles moving to dealers in violation of the terms and conditions of its certificate. Indeed, it admits such unlawful transportation, the only defense being offered for such action being that it is difficult to ascertain when such traffic is moving. Such is not the case. The record appendix bears out this point (RA pp.1560, 1594, 1624, 1626, 1801, 1807).

The court's attention is directed to voluntary statements made under oath by one of petitioner's officers which appears in the record appendix. (RA pp.1974-2026).

Despite petitioner's protestations the record of appendix is clear and unequivocal that petitioner, as a matter of fact did, knowingly and willfully transport automobiles moving to automobile dealers. The Administrative Law Judge (RA p. 1560) stated:

The record is clear that respondent did, in fact, move cars to automobile dealers in violation of its certificate despite the clear and unequivocal language of the certificate.

The underlying findings of facts made by the Hearing Officer amply support the foregone conclusion (RA p. 1594):

The certificate of the respondent contains a restriction against the transportation of any traffic "moving to automobile dealers" a witness for the Bureau of Enforcement submitted an analysis of 15 shipments, the consignee in each of which was an automobile dealer. In behalf of the respondent, and in the petition for interpretation of its certificate, the respondent asserts that the restriction is impossible of consistent interpretation, is vague, is indefinite and does not, under possible interpretation thereof, permit petitioner to offer a complete service to its shippers.

The ultimate conclusions of the Administrative Law Judge in the matter to which the appeal is directed before the Commission are clear and unequivocal (RA p. 1560):

The Judge further finds that respondent has been and is performing the operations not authorized by its certificate, including the transportation of repossessed, stolen, or abandoned used automobiles moving to automobile dealers in driveaway service, in secondary movements, from various states to points in New York, California, and Florida in violation of Section 206(a) of the Act and the terms and conditions and

limitations of said certificate including specifically the condition restricting the authority granted therein against the transportation of traffic moving to automobile dealers.

The Judge further finds that the petition in No. MC-C-7287 (Sub. No. 1) should be denied.

Petitioner relies on its initial application reported at 102 M.C.C. 393 to buttress its argument that the restriction is ambiguous and incapable of being interpreted by reasonable beings. Such is not the case. In dredging up an agency matter which is not on review, petitioner submits certain documents with the record appendix. The record appendix contains quotes directly from the initial application wherein petitioner received its certificate. At RA p. 1622 there is a colloquy between applicant and one of the original protestants to the application from whence the certificate was derived. There is testimony that a private individual shipped an automobile to a dealer in California and did so by calling petitioner. There were objections to the evidence by other protestants in that the witness was not qualified to testify in support of the application, however, the evidence was admitted in the initial proceeding (RA p. 1622).

The same situation appears again in the record appendix. At RA 1623 there is another colloquoy between a witness supporting the initial application of petitioner and a protestant's representative. It developed on the record that movements to finance companies ultimately were destined to automobile dealers and, as such, were in violation of the voluntarily and restrictively amended application (RA p. 1624).

Although petitioner has repeatedly argued through the years that the restriction in question and treated by the Commission, applied only to the business of moving automobiles from manufacturers to dealers (RA 1627), such is not the case. Had this been the case the Commission would have couched the restriction in such terms. The statement of petitioner's vice president and secretary makes it abundantly clear that petitioner realized it was violating the restriction in its certificate and endeavors to explain away such violations (RA 1975 through RA 2026).

Contrary to the representations made by petitioner on pages 6 and 7 of its brief, it is an uncontroverted fact that 15 movements were consigned to

dealers. The after-the-fact efforts of petitioner to explain away the transgressions are nothing more than unconfirmed self-serving statements. The request that petitioner has made for declaratory order is also such a tactic.

Petitioner endeavors to minimize the effect of its unlawful transportation activities upon intervenor, Auto Driveaway Company and the entire industry engaged in the transportation of used automobiles in driveaway service. Its willful violations of the Interstate Commerce Act are of great concern to intervenor. Moreover, the record in this matter when before the Commission is complete with instances where all manner of tactics were used in order to avoid its responsibilities as a common carrier. Indeed, this very court has had an opportunity to examine these practices involving arbitration of certain differences between AAACon and State Farm Mutual Automobile Insurance Company. See In the Matter of AAACon Auto Transport, Inc., and State Farm Mutual Automobile Insurance Co. June 9, 1976 (CA-2) 1976, Fed.Car. Cases 182,618. Its record of claims dealing with the shipping public although it asserts the matters have been rectified, is sufficient grounds for the Commission to

find that petitioner is unit. In Aero-Mayflower Transit, Inc., Allied Van Lines, Inc., v. Interstate Commerce Commission and U.S., 636 F. 2d. 997 (CA-7) (1976), a similar situation existed in that the Commission had invoked certain sanctions against Aero amounting to 13 violations of the Act. The court found that Allied had demonstrated an affirmative effort to place its house in order which is not the case with the instant proceeding.

In the dissent, Judge Tone, Circuit Judge stated:

While I am not unsympathetic to the majority's view that so small a proportion of violation out of a total of 3100 shipments is de minimis, we do not have the authority, in my opinion, to impose a de minimis standard on the Commission. Even a single violation among many transactions conducted in compliance with the law may be punished by the Commission, as United States v. Illinois Central RR, 303 U.S. 239 (1939), illustrates. Imposing a second suspension on the carrier for these isolated violations of an order which the carrier's management appears to have made a good faith attempt to obey, may seem pointless and petty, but I think the Commission has the authority to do it.

Petitioner contends that many of the transactions relating to used automobiles moving to dealers and handled

by its California agent, were done so without its knowledge or authority. Regardless of the disclaimer the parties blamed by petitioner for the unlawful transactions were responsive to the principals and the agent's acts are those of the principal.

Petitioner AAACon should not beguile this court with its arguments. It contends that a prior application to obtain specific authority to transport traffic to dealers was dismissed because of the Commission's practice of "flagging". Petitioner's brief (page 3) clearly distorts the impact of the decision upon which it relies in North American Van Lines v. United States, 412 F. Supp. 782 (1976) Fed. Car Cases paragraph 82,614, 92,615. In North American the Commission held up a number of applications for extensions of authority as a result of a single series of fitness questions. Here petitioner has withdrawn one application (No. MC-125808, Sub. No. 2) which, in all probability, would have been expanded to include the fitness question presented by the Commission's Bureau of Enforcement. An action seeking a declaratory order does not entail the issuance of operating authority and therefore the Bureau of Enforcement would not intervene in such a matter.

It may be justifiably concluded that petitioner has established a definite pattern of knowing and willful disregard of the Commission's rules and regulations.

Petitioner is attempting to retry the case before this court and have this court appraise the evidence which is undisputed and which has been fully considered by the Commission. In Salem Transportation Co. v. United States, 285 F. Supp. 322, 324 (S.D. N.Y. 1968), the court pointed out that:

Salem simply is asking this court to appraise the evidence differently than the Commission did. That is not the function Congress has assigned to us. We are limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 535-36, 66 S. Ct. 687, 90 L. Ed. 821 (1946).

The order under review is fully supported by reliable probative and substantial evidence as stated by the Commission in its decision:

We are of the opinion that the record as it now stands is sufficiently detailed to have guaranteed AAACon and Auto Trip a fair hearing on the issues under consideration in these proceedings. AAACon's general operating practices, not the merits of any particular claim, are the subject of this investigation. The ultimate resolution of each and every claim

cited by the Bureau would further delay the conclusion of these proceedings, with little or no expectation that the additional evidence would contribute anything to the resolution of the primary issues at hand. We are not seeking in this proceeding to determine the relative merits of particular claims. On the other hand, the fairness, justice, or reasonableness of AAACon's claims handling practices and operating procedures, as established by the record, is a proper subject of our investigation, and will, to a great extent, determine the action taken by us (RA p.1801).

The order was issued on consideration of the entire record as pointed out by the Commission in its decision:

As noted above, AAACon and Auto Trip, have, throughout the course of these proceedings, repeatedly filed petitions seeking leave to admit additional evidence and argument, and petitions for reconsideration of the Commission's orders denying the relief sought. We have, of course, at all times made every effort to provide petitioners with a full opportunity to be heard with respect to matters under consideration here, and to deal properly and fairly with each petition. However, these numerous petitions have unnecessarily lengthened the record in this proceeding by the addition of material which is either already part of the record or not pertinent to the issues to be decided. We do not believe that the best interests of the shipping public or the parties immediately concerned is served by the filing of numerous repetitive petitions of this nature (RA p. 1802).

And, further, it states:

. . . we are concerned here with an examination of AAACon's practices and procedures

in order to determine whether it has conducted its operations in a reasonable manner, consistent with its obligations as a motor common carrier under authority issued by this Commission. The relative merits of a particular claim, or its specific resolution is of no significance to our investigation, because it may be due to any number of reasons having little or no relation to the overall reasonableness of AACCon's practices and procedures.

We believe that the evidence of record properly supports the Administrative Law Judge's finding that AACCon has in the past conducted itself in such a way as to discourage the filing of damage claims and has otherwise sought to avoid its responsibilities as a motor common carrier as set forth in the Interstate Commerce Act. Section 20(11), which has been made applicable to part II of the act by section 219, restates the common law rule that a motor common carrier is virtually an insurer against loss, damage, or injury to property it accepts for transportation, Loss and Damage Claims, *supra*, at page 522 (RA p. 1803).

Finally, the Commission concludes:

The incidents cited above, as well as those which respondent admits violated the restriction contained in its certificate, demonstrates that AACCon has transported vehicles beyond the scope of its authority in violation of the clear intent of the restriction contained in the involved certificate, and has thereby shown itself to have been operating in interstate or foreign commerce in an unlawful manner (RA p. 1807).

Petitioner's attack upon the order under review is a glaring effort to retry the matter before this court, notwithstanding, the Commission, after proper notice of the issues, has heard this matter, made findings of fact and conclusions of law relating to each and every instance of petitioner's failure to respond to the provisions of the Interstate Commerce Act. Such efforts for retrial should not be entertained.

It unquestioned that the court's power is limited when reviewing an order of the Interstate Commerce Commission. The Commission's determination must be upheld if it is based on substantial evidence, and is not arbitrarily capricious or erroneous as a matter of law. The court cannot substitute its own judgment for that of the Commission absent an abuse of discretion. The function of the reviewing court is limited to ascerta...n whether there is warrant in the law and the facts for what the Commission has done. The court cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others for the Commission's judgment upon matters committed to its determination if that has support in the record and the

applicable law. United States v. Pierce Auto Freight Lines, 327 US 515, 536.

Judicial review of an Interstate Commerce Commission order is very limited. The courts function is to determine whether the ultimate findings of the Commission are supported by substantial evidence on the whole record and do not involve an error of law. Once it is found that the Commission's findings are supported by substantial evidence and that in arriving at its determination the Commission did not depart from the applicable rules of law, that is the end of the matter. On the other hand, the Commission's order must be reversed if in arriving at its determination the Commission failed to follow the applicable law or if its findings are arbitrary and capricious and have no basis on the record as a whole.

See Truck Transport, Inc. v. United States, (D. C. Mo. 300 Supp. 159, 161), 1969.

Although petitioner tries to explain away the fact that it did transport used automobiles to dealers and endeavors to minimize this with the number of shipments it has transported over an extended period of time, there is no obligation that the findings of the Commission must be supported by a preponderance of the evidence.

As stated in Truck Transport, supra at 161:

Substantial evidence need not necessarily be a preponderance of evidence. It is sufficient if it is that degree of evidence which would justify, if the trial were to a jury, the refusal to direct the verdict when the conclusion to be drawn is one of fact for a jury.

Therefore, based upon the facts of record and the law the finding by the Commission that petitioner engaged in unjust and unreasonable practices in violations of the Interstate Commerce Act was not arbitrary or capricious, and was based upon substantial evidence and the entire record.

B. DENIAL OF PETITION FOR A DECLARATORY ORDER TO INTERPRET CERTIFICATE OF PETITIONER IS WITHIN THE SOUND DISCRETION OF THE I.C.C., WAS NOT ARBITRARY OR CAPRICIOUS, NOR DOES IT DEPART FROM A PRIOR NORM

The Commission may issue a declaratory order to terminate a controversy or remove uncertainty. (Adm. Proc. Act 5 U.S.C. § 554(e)). In its decision the Commission found that the restriction against the transportation of traffic to automobile dealers is clear and unambiguous, serves a useful purpose and the petition should be denied (RA p. 1809).

However, in order to place this proceeding in its historical perspective it is necessary to outline briefly the events leading up to the order to which this appeal is directed. Petitioner seeks to have this court interpret the restriction in its certificate of public convenience and necessity No. MC-124808, Sub. No. 1, as ambiguous and incapable of interpretation and remand the matter back to the Commission in order that petitioner may have the restriction against traffic moving to dealers removed. Underlying the certificate of public convenience and necessity is the Commission's decision in AAACon Drivers Exchange, Inc., Common Carrier Application 102 M.C.C. 393. The restriction to which AAACon directs this appeal is one which was voluntarily taken when it was an applicant before the Commission. It is stated at page 394 of AAACon Drivers Exchange, supra:

By application filed May 27, 1965 as amended, AAACon Drivers Exchange, Inc., of New York, N.Y. seeks a certificate of public convenience and necessity, authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of used passenger automobiles, used trucks (3/4 ton or less), with or without baggage, sporting equipment, and personal effects, in secondary movements, in

driveaway service, between points in the United States including Alaska, restricted against transportation of the above-described vehicles for or on behalf of manufacturers of automobiles and trucks, or to dealers of automobiles and trucks, against the handling of such traffic having a prior movement by rail or water, and against the handling of such traffic on government bills of lading. Insured Transporters, Inc. (Insured), Atlantic-Pacific Drive-Aways, Inc., (Atlantic-Pacific), Auto Driveaway Company (Auto Driveaway), and Bell Transportation Co. Inc., (Bell), oppose the application. Several other carriers withdrew their opposition upon amendment of the application to its present form and subsequent thereto. 1/

The Examiner recommended that applicant be granted the authority sought between points in New York, New Jersey, and Connecticut, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii, restricted against the transportation of any traffic (1) moving to or from automobile manufacturers or dealers, (2) moving on government bills of lading, or (3) having a prior movement by rail or water. The examiner found applicant fit to perform the service and to conform to the Commission's rules and regulations. He also recommended that a condition be

1/ F.J. Boutell Driveaway Co., Inc., Nu-Car Carriers, Inc., Dealers Transit, Inc., The Motor Convoy, Inc., and Kenosha Auto Transport withdrew upon amendment. Dependable Car Travel, Inc., by letter dated April 28, 1966, withdrew its protest, exceptions, and opposition to a grant of the proposed service.

imposed reserving the right to impose upon the certificate hereinafter issued, such terms and conditions or limitations as the Commission may in the future find necessary to insure that the service authorized is performed in conformity with the Commission's safety regulations.

On exceptions, applicant argues that the examiner erred in failing to consider the evidence of Car Traders, Inc. (Car Traders), in failing to consider the absence of certificated service within the scope of the application, in recommending a grant of radial authority and disregarding evidence concerning the need for the proposed service between other points, in excluding Alaska from the recommended authority, in miscalculating the volume of traffic handled by applicant at its Los Angeles office, and in imposing the restriction against service from dealers. It urges that the Commission grant a further hearing if it concludes that evidence of applicant's mode of operations at its New York, N.Y. office is insufficient to support a grant of authority embracing operations conducted from its offices at Los Angeles, Calif., Chicago, Ill., and Miami, Fla.

It appears that parties to the proceeding before the Commission withdrew their opposition to the application upon the voluntary amendment set forth above by applicant AAACon.

Now comes AAACon and uses an entirely different matter to launch a collateral attack upon a certificate of public convenience and necessity which it has held for approximately ten years. It is submitted that petitioner

has rested on this matter for a substantial period of time, never having questioned the meaning of the restriction against traffic "moving to dealers" until it filed its petition for declaratory order which was nothing more than a defense tactic when it became aware that the Commission was investigating petitioner concerning unlawful transportation activities.

In view of the fact that the restrictive amendment was voluntarily taken by petitioner, that petitioner did not exhaust its administrative remedies on this point at the time the certificate was issued; nor did it seek judicial review of the matter at that time; this court is left with very little to review concerning the interpretation of the restriction.

When reviewing an order of the Interstate Commerce Commission the court is confined to the interpretation placed by the Commission upon a certificate of its own creation. In this instance, the certificate as granted was not the Commission's creation, but that of petitioner itself. Whatever interpretation the Commission places upon the certificate binds a court unless such interpretation is capricious or arbitrary, constitutes an abuse

of discretion, or violates an established principle of law. The court is not obligated to construe the interpretation placed upon the certificate, de novo, nor reevaluate the undisputed facts relating to the services performed under the certificate which is under attack. The court should not be concerned with the weight of the evidence. The task of construing a certificate has been placed upon the Commission by Congress, and such construction should not be disturbed unless clearly erroneous. Nelson v. United States, 355 U.S. 554 (1958); Baseline Express, Inc., v. United States, 308 F. Supp. 721 (D. Colo. 1970); Denton Produce, Inc., v. United States, 270 F. Supp. 402 (W.D. Okla. 1967); Dunkley Refrigerated Transport, Inc., v. United States, 253 F. Supp. 891 (D. Utah 1966).

Moreover, any attack upon the certificate of public convenience and necessity should have been made at the time that the order in the AAACon Drivers Exchange matter had become administratively final. The restriction against traffic moving to automobile dealers therefor is neither ambiguous nor incapable of interpretation. It is in the mind of petitioner itself only that

such ambiguity exists, for petitioner voluntarily took such a restriction perhaps in order to eliminate opposition to its initial application from whence the certificate was issued.

Thus, in denying the order for a declaratory order the Commission did not act arbitrarily and capriciously nor depart from a previous norm in finding that the restriction in the certificate of public convenience and necessity held by petitioner against the transportation of traffic to automobile dealers was clear and unambiguous and served a useful purpose.

The Commission in its decision states:

The restriction was imposed to protect the interests of motor carriers engaged in the transportation of vehicles to auto dealers, and to define the nature of the service authorized by AAACon's certificate No. MC-125808 (Sub. No. 1). We believe that AAACon's and Auto Trip's contentions that the restriction is vague, ambiguous, or illegal is without merit; that the Administrative Law Judge properly found that the restriction is clear on its face and unambiguous, and, therefore, he properly denied the relief sought in AAACon's petition for declaratory order, as set forth in No. MC-C-7287 (Sub. No. 1), and embraced herein, and the relief sought therein will be denied (RA p. 1808).

C. THE I.C.C. DID NOT ACT ARBITRARILY OR
CAPRICIOUSLY IN DENYING THE APPLICATION OF AUTO TRIPS,
USA, INC. FOR A FREIGHT FORWARDER PERMIT

The denial of the permit was based upon a finding of unfitness by the Commission (RA p. 1809).

The Commission's rationale was as follows:

AAACon and Auto Trip are operated by the same directors, and Auto Trip is a wholly owned subsidiary of AAACon. The corporate veil may properly be pierced in determining issues of fitness of motor carrier applicants and we see no reason why the same rule should not apply here. Compare Driver Service, Inc., - Investigation of Operations, 77 M.C.C. 243 (1958). Although AAACon's fitness has not been directly in issue in the proceedings herein, as no AAACon application proceeding is involved, the matters considered herein certainly reflect upon AAACon's fitness and, as a result, upon the qualifications of Auto Trip to operate as a freight forwarder. We conclude that the record reveals that the management of AAACon, and, by implication, Auto Trip, is not willing and able, to comply with the appropriate laws, rules, and regulations, and we conclude that were an application of AAACon's before us herein we would find AAACon to be unfit and, accordingly, we must find that Auto Trip, AAACon's wholly owned subsidiary, is not a qualified applicant for freight forwarder authority. The application in No. FF-359 will be denied.

As noted above, a grant of the permit would enable petitioner to circumvent the restriction in its certificate

against the transportation of traffic to automobile dealers.

Thus, the sound, reasoned judgment of the Commission was here exercised in the public interest and in compliance with the statutory requirements.

The courts in dealing with the propriety of certain taxicab operations and whether a particular exemption applied, clearly enunciated the power of the Commission to make findings of fitness and to bar grants of authority or such other relief when a respondent is found to be not fit. In The Terminal Taxi Co. Inc., v. U.S. et al., (U.S. D.C. Conn. 1972) 1972 Fed. Car. Cases 182,363, it was found that the Commission will deny requests of authority if the carrier's past unlawful operations, acts, and omissions, were done willfully and knowingly with the intent of evading or defeating the purpose of regulation.

There, as here, the record demonstrated a pattern of serious or continuing violation and respondent did nothing to carry its burden of refuting the import of such past conduct in order to establish its fitness to receive additional authority.

In Terminal it is stated at page 55,701 (1972)

Fed. Car. Cases 82,363:

The Commission's finding of unfitness was based upon several considerations. The Commission first attached importance to Terminal's persistent course of illegal conduct after the initial notification, in 1961, that its operations to New York City were violative of the Act. The Commission pointed out that although Terminal ceased direct service to New York City after the 1961 notification, by 1966 Terminal was once again providing such service through its arrangement with Brown's. Similarly, after three notifications from the Commission and state officials as to the illegality of that arrangement, Terminal discontinued that interchange arrangement, only to resume direct service to New York City and other points outside of Connecticut. As already pointed out, this last interstate activity was extensive and continued until August 1967.

It was further stated in Terminal at page 55,701

(1972) Fed. Carrier Cases 82,363:

The Commission has, however, denied licenses to applicants whose unlawful activities were not especially severe, and were limited to a moderate number of insrances. See e.g. Preston K. Moyer, Contract Carrier Application, 81 M.C.C. 57, 70 (1959); J.J. Gentry Extension - Douglas County, Oregon 78 M.C.C. 473, 475 (1958); Burnham Warehouses, Inc., Extension - Columbus, Georgia, 67 M.C.C. 799, 800 (1956).

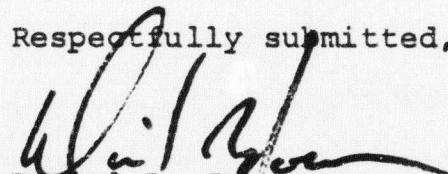
Therefore, the denial of the application for a freight forwarder permit in No. FF-359 Auto Trip, USA, Inc., was not arbitrary or capricious but a sound exercise of the expertise and judgment of the Commission.

Viewing the record as a whole, the Commission has complied with the statutory requirements and therefore has not acted in an arbitrary and capricious manner nor has there been an abuse of discretion by the Commission. The order of the Commission was supported by substantial evidence and the entire record, nor did the Commission depart from its norm.

CONCLUSION

For the foregoing reasons, the Court shall dismiss the appeal.

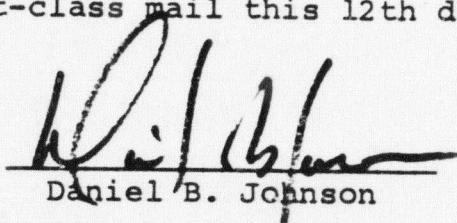
Respectfully submitted,


Daniel B. Johnson
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AUTO DRIVEAWAY COMPANY

Dated October 12, 1976

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
reply brief has been served on the following parties
of record by prepaid first-class mail this 12th day
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EXHIBIT A

ADMINISTRATIVE PROCEDURE ACT

Sec. 554(e) [5 USC §554] The agency, with like effort as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove an uncertainty.

INTERSTATE COMMERCE ACT

Sec. 20(11) [49 U.S.C. § 20(11)] That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed;

Sec. 204(c) [49 U.S.C. § 304] Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to

compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.

Sec. 206(a)(1) [49 USC § 306] Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations.

Sec. 212(a) [49 USC § 312] Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: Provided however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a)

or temporary authority under section 210a. may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Sec. 216(b) [49 U.S.C. § 316(b)] It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto and to the manner and method of presenting, marking, packing and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

Sec. 219 [49 U.S.C. § 319] The provisions of section 20(11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.